

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 27458-6-III

Respondent,

)

)

) **Division Three**

v.

)

)

BRYCE K. DEGAGNE,

) **UNPUBLISHED OPINION**

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Appellant.

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)

Kulik, J. — Bryce DeGagne appeals the offender score allocated to his convictions for first degree burglary and first degree robbery. He asserts the crimes constituted the same criminal conduct under RCW 9.94A.589. He also appeals the court’s imposition of a no contact order between himself and Tracy Forder, the alleged victim of the robbery for which Mr. DeGagne was acquitted. At sentencing, Mr. DeGagne acknowledged his offender score. The State concedes the no contact order was entered in error. We affirm the sentence and vacate the no contact order regarding Ms. Forder.

FACTS

On July 23, 2007, Richard Tracy was asleep in the living room of his apartment after returning from working a night shift. Mr. Tracy awoke when two uninvited individuals entered his home. Mr. Tracy recognized one of the individuals as Bryce DeGagne. Mr. Tracy greeted Mr. DeGagne and got up to get a drink from his kitchen. The other individual, later identified as Antonio Rodriguez, held a gun to Mr. Tracy's face, hit him in the back of the head with the gun, and threw him down on an air mattress. Mr. DeGagne asked Mr. Tracy where he kept his money and Mr. Tracy denied having any. Mr. DeGagne hit Mr. Tracy repeatedly on the back of the legs with a police baton.

Mr. Tracy heard the two men debating about what items they should take from the apartment and discussing whether they should shoot Mr. Tracy. Mr. DeGagne and Mr. Rodriguez then left the apartment with Mr. Tracy's X-box, iPod, DVDs, video games, watch, cell phone, and \$130 in cash. Mr. Tracy was punched in the face and suffered bruises on his legs, a concussion, and an injured lip.

After Mr. Tracy talked with police about the incident, Sergeant Robert Sherar spoke with Mr. DeGagne on August 6, 2007. Mr. DeGagne admitted stealing the items from Mr. Tracy's apartment and acknowledged hitting Mr. Tracy with the baton. Police arrested Mr. DeGagne and charged him with one count of first degree burglary and one count of first degree robbery against Mr. Tracy, and one count of first degree robbery

stemming from a separate incident involving Tracy Forder.

A jury found Mr. DeGagne guilty of first degree burglary and first degree robbery with deadly weapon enhancements, but acquitted him of the robbery charge involving Ms. Forder.

At the sentencing hearing on March 7, 2008, Mr. DeGagne and his attorney signed the understanding of defendant's criminal history, without objection. Mr. DeGagne's offender score for the burglary conviction was an 8, with a sentencing range of 125 to 150 months, and a 7 for the robbery conviction, with a sentencing range of 135 to 164 months. Mr. DeGagne verbally acknowledged, and agreed to, the offender scores during the sentencing hearing, without objection.

Mr. DeGagne was sentenced to 137 months' confinement, with 18 to 36 months' community custody, for his burglary conviction, and 149 months' confinement, with 18 to 36 months' community custody, for his robbery conviction to run concurrently. The court ordered Mr. DeGagne to have no further contact with Richard Tracy and Tracy Forder for the remainder of his life.

ANALYSIS

Same Criminal Conduct. RCW 9.94A.589(1)(a) provides that when a defendant is sentenced for two or more current offenses, “the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score,” unless the court determines that the current offenses encompass the “same criminal conduct.” If two or more current offenses encompass the same criminal conduct, then the offenses are counted as one crime in calculating the offender score. RCW 9.94A.589(1)(a). “Same criminal conduct” is defined as “crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). All three elements must be present for multiple offenses to be considered the same criminal conduct. *State v. Dolen*, 83 Wn. App. 361, 364, 921 P.2d 590 (1996). A trial court’s determination of what constitutes “same criminal conduct” for the purpose of calculating an offender score will be reversed “only for an abuse of discretion or misapplication of the law.” *Id.*

To determine whether two crimes encompass the same criminal intent, this court reviews the “objective criminal purpose behind each crime,” rather than the “particular *mens rea* element of the particular crime.” *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). Courts also look at whether the objective criminal purpose “changed from one crime to the next.” *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749

P.2d 160 (1987). An example of this analysis can be found in *State v. Anderson* where the court determined that the crimes of escape and assault encompassed the same criminal intent, where the assault was committed to effectuate the defendant's escape. *State v. Anderson*, 72 Wn. App. 453, 463-64, 864 P.2d 1001 (1994). The defendant's intent, throughout both crimes, was to escape custody. *Id.*

In the present case, Mr. DeGagne committed the crimes of burglary and robbery. The objective criminal purpose of robbery, as determined by the courts, is to "acquire property." *Dunaway*, 109 Wn.2d at 216. In regard to the burglary conviction, a necessary element of first degree burglary is that the accused must unlawfully enter a building *with intent* to commit a crime. RCW 9A.52.020. Mr. DeGagne entered Mr. Tracy's home unlawfully with the intent to commit a robbery. The objective criminal purpose behind his commission of the crime was to acquire property from Mr. Tracy. It can be concluded, in this case, that the two crimes committed by Mr. DeGagne encompassed the same criminal intent.

The facts also show that the crimes were committed in the same place, Mr. Tracy's apartment, and at the same time, on the morning of July 23, 2007. It is also clear that the victim of both crimes was Mr. Tracy. Therefore, since Mr. DeGagne's commission of burglary and robbery in the first degree concerned the same criminal intent, were

committed at the same time and place, and involved the same victim, the two crimes encompass the “same criminal conduct” for purposes of Mr. DeGagne’s sentencing. Under normal circumstances, Mr. DeGagne’s current convictions would not be factored into either of his offender scores, and this case would be remanded for resentencing.

However, Mr. DeGagne waived his right to appeal this issue. Generally, “a defendant cannot waive a challenge to a miscalculated offender score.” *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Nevertheless, a “waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.” *Id.*; see also *In re Pers. Restraint of Shale*, 160 Wn.2d 489, 494, 158 P.3d 588 (2007). Courts have also determined that the issue of “same criminal conduct . . . involves both factual determinations and the exercise of discretion.” *Id.* at 495.

In *State v. Nitsch*, 100 Wn. App. 512, 997 P.2d 1000 (2000), the defendant argued for the first time on appeal that the crimes that he committed constituted the same criminal conduct under former RCW 9.94A.400, recodified as RCW 9.94A.589 (Laws of 2001, ch. 10, § 6). The Court of Appeals determined that Mr. Nitsch waived his right to bring this issue on appeal because he affirmatively acknowledged his offender score during trial in a presentencing memorandum, and failed “to identify a factual dispute for

the court’s resolution and . . . to request an exercise of the court’s discretion” on the issue. *Nitsch*, 100 Wn. App. at 520. The court noted that ““acknowledgment allows the judge to rely on unchallenged facts and information introduced for the purposes of sentencing.”” *Id.* (quoting *State v. Ford*, 137 Wn.2d 472, 482-83, 973 P.2d 452 (1999)).

In Mr. DeGagne’s case, he affirmatively acknowledged and accepted his offender score before the court during the sentencing hearing. Mr. DeGagne did not request the trial court to exercise its discretion on whether his crimes constituted the same criminal conduct. Based on these facts, Mr. DeGagne has effectively waived his right to address this issue for the first time on appeal.

No Contact Order. Former RCW 9.94A.700(5) (2003)¹ authorizes the court to impose special conditions on anyone placed in community custody following time spent in jail. One of these conditions includes restricting the offender from having “direct or indirect contact with the victim of the crime or a specified class of individuals.”

Former RCW 9.94A.700(5)(b). In order to impose a no contact order, the person protected by the order must be reasonably related to the offender’s convictions. *See State v. Warren*, 165 Wn.2d 17, 32-34, 195 P.3d 940 (2008), *cert. denied*, 129 S. Ct. 2007 (2009).

¹ Former RCW 9.94A.700 (2003), *recodified as* RCW 9.94B.050 (Laws of 2008, ch. 231, § 56, effective August 1, 2009).

In the current case, the jury acquitted Mr. DeGagne of the crime in which Ms. Forder was the alleged victim. Therefore, a no contact order cannot be imposed with regard to Ms. Forder. Additionally, there is no evidence to suggest that Ms. Forder should fall within a specified class under the statute, such as a relative or close friend of a victim. Further, the State concedes the no contact order was not reasonably related to Mr. DeGagne's conviction.

We affirm the trial court's calculation of Mr. DeGagne's offender score, but remand for vacation of the no contact order concerning Ms. Forder.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, J.

WE CONCUR:

Schultheis, C.J.

Brown, J.